No. 17-1705

In the Supreme Court of the United States

PDR NETWORK, LLC, *et al.*,

Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PROFESSOR ADITYA BAMZAI AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Hobbs Act required the district court in this case to accept the FCC's legal interpretation of the Telephone Consumer Protection Act.

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INTEREST OF *AMICUS CURIAE*[*]

Aditya Bamzai is an associate professor at the University of Virginia School of Law. He teaches and writes about civil procedure, federal courts, and administrative law, and he has an interest in the sound development of these fields.

SUMMARY OF ARGUMENT

Does a federal district court "determine the validity" of an agency's regulation under 28 U.S.C. § 2342 by interpreting a statute contrary to the interpretation embraced in the regulation? In this case, the answer to that question is no, though for reasons somewhat different from those given by the petitioners.

The Administrative Orders Review Act — commonly referred to as the "Hobbs Act" after its principal sponsor, Representative Samuel Hobbs — splits the jurisdiction of federal courts to address certain legal questions in certain federal cases. *See* Pub. L. No. 81-901, 64 Stat. 1129 (1950) (codified as

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[*] The parties have consented in writing to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. The University of Virginia School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

amended at 28 U.S.C. §§ 2341-2351). It vests "exclusive jurisdiction" in the courts of appeals to perform a set of specified actions, with review obtainable within a 60-day time period and with regard to certain orders and regulations. But the Act leaves district courts to take any other actions — specifically, any actions *not* specified in the Hobbs Act's text — in the ordinary course of the district court's functions. By splitting federal court jurisdiction in this manner, the Hobbs Act raises questions of constitutional structure and statutory meaning.

First, as to constitutional structure: This Court addressed the constitutionality of such a "jurisdiction-splitting" provision in *Yakus v. United States*, 321 U.S. 414 (1944), where it held that the "exclusive jurisdiction" provisions of the Emergency Price Control Act of 1942 complied with due process and Article III. That statute created the Emergency Court of Appeals, a temporary Article III court vested with the "exclusive jurisdiction" to "determine the validity of any regulation or order" promulgated by the Office of Price Administration under certain statutory authorities. The *Yakus* Court held that this provision precluded a criminal defendant from raising the invalidity of a regulation as a defense in his criminal trial. In the Court's view, it was constitutional for Congress to "deprive" criminal defendants "of opportunity to attack" a regulation "in a prosecution for its violation." 321 U.S. at 431.

Yakus is a controversial precedent that has been criticized by Justices of this Court and by scholars. Indeed, the Court has gone so far as to suggest that aspects of *Yakus* should be cabined to the wartime

context. But this Court can decide this case based on a faithful construction of the Hobbs Act. If this Court, however, were to construe the Hobbs Act's jurisdictional provisions too broadly, it would raise a similar set of questions under Article III and the Due Process Clause as the Court confronted in *Yakus* — and it would require this Court to revisit that case's holding in the peacetime context.

Second, as to statutory meaning: The precise boundary between matters reviewable only directly and those reviewable in collateral proceedings is specified by the Hobbs Act's statutory terms. The courts of appeals have "exclusive jurisdiction" to "enjoin, set aside, suspend (in whole or in part), or [ ] determine the validity" of certain specified orders, 28 U.S.C. § 2342, including certain orders promulgated by the Federal Communications Commission ("FCC"), § 2342(a). To the extent that a statute other than the Hobbs Act vests courts with jurisdiction, a district court is free — indeed, it is obligated — to adjudicate a case using generally applicable principles, *unless* the district court takes one of the four actions identified in the Hobbs Act's text.

When a district court merely disagrees with an interpretation expressed in an agency's regulation, it does not take any of the four actions specified by the Hobbs Act. Congress borrowed the terms used in the Hobbs Act — "enjoin," "set aside," "suspend," and "determine the validity" — from preexisting statutory schemes governing judicial review of agency action. The term "enjoin" is familiar from the law of equitable remedies. At the time of the Hobbs Act's adoption in 1950, the terms "set aside" and "suspend" were also

familiar from special statutory provisions governing judicial review of agency action, such as the Urgent Deficiencies Act of 1913.

That leaves the statutory term "determine the validity of." Here, again, the key precedent is *Yakus*. As *amicus* explains below, the most natural inference is that, when Congress enacted the Hobbs Act in 1950, it borrowed the statutory language "determine the validity of" from the Emergency Price Control Act of 1942, which the Court construed in *Yakus* in 1944. Like the Hobbs Act, the Emergency Price Control Act split the jurisdiction of the federal courts, using similar terms to draw the line between the jurisdiction of the Emergency Court of Appeals and that of federal district courts. The most natural way to read "determine the validity of" in the Hobbs Act, thus, is to interpret those terms to carry the same meaning given to them in *Yakus*, as well as the same limitations that would have been in place when Congress enacted the Hobbs Act in 1950. *Yakus* held that a district court "determined the validity of" a regulation when the crime charged was a violation of the regulation itself. The validity of the regulation was necessarily an element of the crime. Where the dispute is (as here) over statutory meaning, the logic of *Yakus* does not apply.

Put differently, a court "determines the validity of" a regulation if, and only if, a violation of the regulation is necessarily a part of the elements of the crime or civil cause of action at issue in the case. The text of the Hobbs Act, the canon of constitutional avoidance, and the interpretive rules in place at the time of the Hobbs Act's enactment all point in the direction of allowing district courts to interpret

statutes, notwithstanding a prior agency interpretation, where the regulation is merely interpretive.

For these reasons, as well as those given below, *amicus* respectfully submits that the Court should reverse the judgment of the court of appeals.

BACKGROUND

This case is about the meaning of a set of terms "with a legal lineage stretching back" to early Twentieth Century statutes authorizing judicial review of administrative action. *Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018). Accordingly, before turning to an analysis of the Hobbs Act's provisions, it is fruitful to describe the constitutional backdrop against which it was enacted, as well as the sequence of statutes that culminated in the adoption of the Act's terms.

A. Constitutional framework

The Constitution's provisions indicate that certain kinds of disputes will occur in regularized processes before courts established under Article III. Article III vests the "judicial power of the United States . . . in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. In addition, the Fifth Amendment provides that no person shall be "deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. But precisely which disputes and under what circumstances these regularized processes must occur has been, and continues to be, a subject of dispute. For at the same time that it vests the "judicial power" in Article III

courts, the Constitution authorizes Congress to limit the jurisdiction of federal courts. *See Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

As a corollary to Congress's authority to limit the jurisdiction of federal courts, this Court has held that, at least under some circumstances, Congress may choose to vest a court with review of certain cases while barring it from reviewing certain questions that arise in the case — giving "exclusive jurisdiction" to review those questions to other courts. The canonical precedent addressing this form of "jurisdiction-splitting" is *Yakus*. *See* Richard H. Fallon, Jr. *et al.*, *Hart and Wechsler's The Federal Courts and the Federal System* 341 (7th ed. 2015) (citing *Yakus* to address "the scope of congressional power to confer jurisdiction on a court while limiting its authority to consider particular issues that are relevant to the controversy").

Decided in 1944 near the height of the Nation's involvement in World War II — indeed, the Normandy landings occurred just a few months after the Court's decision — *Yakus* concerned a wartime measure known as the Emergency Price Control Act of 1942 (hereinafter, "EPCA"), 56 Stat. 23, 50 U.S.C. App. Supp. II, § 901 *et seq.*, as amended by the Inflation Control Act of October 2, 1942, 56 Stat. 765, 50 U.S.C. App. Supp. II, § 961 *et seq.* In an effort to forestall wartime inflation, the EPCA created an Office of Price Administration ("OPA") and authorized its head, the Price Administrator, to set maximum prices for commodities and rents throughout the U.S. economy. *See Yakus*, 321 U.S. at 419-20; EPCA §§ 1(a), 2, 201(a), 56 Stat. at 23-24, 29 (describing the EPCA as "in the

interest of the national defense and security and necessary to the effective prosecution of the present war").

The EPCA created "exclusive jurisdiction" to review the lawfulness of the OPA's orders in the Emergency Court of Appeals, a tribunal staffed by Article III judges temporarily established to handle appeals from the Price Administrator. EPCA § 204(c), 56 Stat. at 32. Specifically, after the promulgation of the relevant regulation, order, or price schedule, a party generally had sixty days to file a protest with the Administrator to test the validity of a maximum price regulation. § 203(a), 56 Stat. at 31 (providing that "any person subject to" a regulation or order may, within 60 days after its issuance, "file a protest specifically setting forth objections" with the Administrator); *see id.* (providing that a later protest may be filed on grounds arising after the expiration of the original 60 days). If unsuccessful, any "person who [was] aggrieved" by the Price Administrator's actions could seek review within 30 days from the Emergency Court of Appeals. §§ 204(a)-(c), 56 Stat. at 31-32. Section 204(d) of the Act then gave the Emergency Court of Appeals (and the Supreme Court, on review of the Emergency Court's judgments) "exclusive jurisdiction to determine the validity of any regulation or order" and barred other courts from "consider[ing] the validity of any such regulation, order, or price schedule." § 204(d), 56 Stat. at 33.

At the same time, the EPCA gave jurisdiction to district courts to adjudicate civil enforcement actions by the Price Administrator, private lawsuits brought under the Act, and (most controversially) criminal prosecutions for willful violations of the Act.

Specifically, the Act pronounced that "[i]t shall be unlawful . . . for any person to sell or deliver any commodity . . . in violation of any regulation or order" promulgated by the Price Administrator. EPCA § 4(a), 56 Stat. at 28. The Act then authorized the Price Administrator to seek relief in district courts for such violations. § 205, 56 Stat. at 33; *id.* § 205(b) (providing that "[a]ny person who willfully violates any provision of section 4 of this Act" has committed a crime).

Yakus arose in the criminal context, after the federal Government charged Yakus and his colleagues with selling wholesale cuts of beef at prices above the maximum prices set by sections 1364.451 to 1364.455 of Revised Maximum Price Regulation No. 169, 7 Fed. Reg. 10381 *et seq.* A jury convicted him and his codefendants, and the First Circuit affirmed. *See* 137 F.2d 850. At the time of his conviction (and of the Supreme Court's review of it), Yakus had not sought judicial review of the regulation under sections 203 and 204 of the Act. *See* 321 U.S. at 418. Indeed, the federal government indicted Yakus after the expiration of the period for filing protests, while at the same time arguing that the defendants could not challenge the validity of the order in the district court proceedings — but rather had to use the "exclusive jurisdiction" provisions in a challenge in the Emergency Court of Appeals.

In *Yakus*, this Court held that Congress could, consistent with Article III and due process, "deprive" criminal defendants "of opportunity to attack" a regulation "in a prosecution for its violation," 321 U.S. at 431, by providing "a sufficiently adequate [alternative] means of determining the validity of" the

regulation," *id.* at 418. In part, the Court's holding appeared to rest on the EPCA's and the regulation's wartime status. The Court observed, for example, that "it is appropriate to take into account the purposes of the Act and the circumstances attending its enactment and application as a war-time emergency measure." *Id.* at 431.

In part, the Court's holding appeared to rest on the broader notion that, even in times of peace, Congress had the "constitutional power . . . to create inferior federal courts and prescribe their jurisdiction." *Id.* at 433. Under this authority, the Court suggested that Congress generally could "foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation." *Id.* at 443. According to the Court, Congress could "mak[e] criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity." *Id.* at 444. As the Court put it, the Constitution does not "preclude[] the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations." *Id.*; *see also id.* at 446 (describing the procedure as one in "which violation of a price regulation is made penal"); *id.* at 447 (noting that the "indictment charged a violation of the regulation").

In holding that the Act complied with Article III and due process, the Court rejected a series of contentions made by Yakus and his codefendants. For example, they argued that the regulation was invalid

because it would compel them to sell beef below the price that would allow them to make a profit. *See id.* at 431. They also argued that the 60-day period afforded by the Act to challenge the order gave them inadequate time to file. *See id.* at 433-34. The Court responded that the period was not "unreasonably short in view of the urgency and exigencies of wartime price regulation." *Id.* at 435; *see id.* at 441-42. The EPCA procedure, the Court concluded, "afford[ed] to those affected a reasonable opportunity to be heard and present evidence." *Id.* The end result was that, absent a "contention that the present regulation is void on its face," Yakus and his codefendants were precluded from challenging its validity in a criminal proceeding against them. *Id.* at 447; *see also Bowles v. Willingham*, 321 U.S. 503 (1944) (holding, in a case decided the same day as *Yakus*, that a landlord could not ask a district court to "determine the validity" of a price regulation in a civil action brought by the Price Administrator).

The Court's decision in *Yakus* was controversial. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1378-79 (1953). It prompted two separate dissents. Justice Roberts dissented on the ground that the statute unconstitutionally delegated legislative power to the Administrator. *See* 321 U.S. at 448. Justice Rutledge, joined by Justice Murphy, argued that Congress lacked the power to confer on federal courts jurisdiction over criminal suits "and at the same time deny them 'jurisdiction and power to consider the validity' of the regulations for which enforcement is sought." *Id.* at 467. "It is one thing," Rutledge reasoned, "for Congress to withhold jurisdiction" and

"entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements." *Id.* at 468. "The problem," as Rutledge put it, "is not solely one of individual right or due process of law," but "equally one of the separation and independence of the powers of government and of the constitutional integrity of the judicial process." *Id.*

Moreover, in the immediate aftermath of *Yakus*, Congress enacted a law to lessen some of the harshness of the EPCA's statutory review mechanism. In the Stabilization Extension Act, 58 Stat. 632 (1944), Congress removed the time period for filing a protest with the Price Administrator and directed a stay of enforcement suits in pending action on a protest already filed or review of its denial. In the case of a "reasonable and substantial excuse for the defendant's failure" to file a protest, a stay similarly was directed to allow a defendant to "file in the Emergency Court of Appeals a complaint against the [Price] Administrator." *Id.* at 639.

Finally, this Court's later cases cabined some of *Yakus*' jurisprudential ramifications. In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court distinguished *Yakus* by arguing in part that the case was limited to the wartime context. *Id.* at 839 n.15. The Court thereby held that an enforcement court could not predicate a criminal violation on a previous administration determination without a meaningful opportunity for the criminal defendant to seek judicial review of the administrative ruling. *See id.* Likewise, in *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), Justice Powell wrote separately to express his views that the EPCA "can be viewed as

a valid exercise of the war powers of Congress," thereby rendering *Yakus* "at least arguably distinguishable" in civil enforcement matters during peacetime. *Id.* at 289-91 (Powell, J., concurring); *see also id.* at 282-84 & n.2 (majority opinion); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 n.9 (1980).

B. Agency review statutes

Against this constitutional backdrop, the Hobbs Act creates "exclusive jurisdiction" in the courts of appeals, while at the same time leaving in place district-court proceedings so long as they do not engage in any of the four actions specified in the Hobbs Act's text. In splitting the jurisdiction of the federal courts in this manner, the Hobbs Act borrows terms from preexisting statutes — most notably, the Urgent Deficiencies Act of 1913 and the EPCA. Accordingly, it is helpful to walk through the steps that led to its adoption.

1. Early statutory review mechanisms.

Preexisting statutory review mechanisms for the agencies that ultimately composed the 1950 version of the Hobbs Act — the FCC, Federal Maritime Commission, and Department of Agriculture — borrowed terminology from an earlier ICC review statute. In 1913, Congress abolished the short-lived Commerce Court and transferred review of ICC orders to three-judge district courts. In a statute known as the "Urgent Deficiencies Act," Congress established the "venue of any suit [ ] brought to enforce, suspend, or set aside, in whole or in part, any order of the [ICC]." Act of Oct. 22, 1913, ch. 32, 38 Stat. 208, 219

(1913); *id.* at 220 (establishing that three-judge district courts were authorized to issue "interlocutory injunction[s] suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, of any [ICC] order"). The terminology used in the Urgent Deficiencies Act was a variation on the language used in earlier statutes establishing judicial review of ICC orders. *See* Act of June 29, 1906 (commonly known as "the Hepburn Act"), ch. 3591, § 5, 34 Stat. 584, 592 (conferring jurisdiction on the circuit courts to "enjoin, set aside, annul, or suspend any order or requirement of the [ICC]"); Act of June 18, 1910 (commonly known as the "Mann-Elkins Act"), ch. 309, § 1, 36 Stat. 539, 539 (conferring on the newly created Commerce Court "the jurisdiction now possessed by the circuit courts . . . over all cases . . . brought to enjoin, set aside, annul, or suspend . . . any order of the [ICC]"); *see, e.g.*, *United States v. Los Angeles & S.L.R. Co.*, 273 U.S. 299, 308-09 (1927) (tracing the genesis of the review provisions contained in the Urgent Deficiencies Act).

These terms — among them, "enjoin," "set aside," and "suspend" — came to embody review through a bill in equity, which formed the basis of much early judicial control of agency action. *Cf. Los Angeles & S.L.R. Co.*, 273 U.S. at 314-15 (noting that the Court need not determine "[w]hether the remedy conferred by the Urgent Deficiencies Act is in all cases the exclusive equitable remedy"); *see* Louis L. Jaffe, *Judicial Control of Administrative Action* 157 (1965) (characterizing the Urgent Deficiencies Act as "[o]ne of the earliest of review statutes").

Thus, when Congress enacted the Communications Act of 1934 (which, among other

things, created the Federal Commissions Commission), it expressly provided that the "provisions of the [Urgent Deficiencies Act], relating to the enforcing or setting aside of the orders of the [ICC], are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act," with specified exceptions. § 402(a), 48 Stat. 1064, 1093 (1934).

Other statutes that became relevant to the Hobbs Act also either incorporated the Urgent Deficiencies Act expressly or used similar terminology. For example, the Shipping Act of 1916 provided that the venue for "suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall . . . be the same as in similar suits in regard to orders of the [ICC]." § 31, 39 Stat. 728 (1916). The Packers and Stockyards Act of 1921 authorized an "appeal[] to the circuit court of appeals . . . by filing . . . a written petition praying that the Secretary's order be set aside or modified" and provided that the "court may affirm, modify, or set aside the order of the Secretary." §§ 204(a), (e), 42 Stat. 159, 162 (1921); *see also id.* § 204(h) ("The circuit court of appeals shall have exclusive jurisdiction to review, and to affirm, set aside, or modify, such orders . . ."). And the Perishable Agricultural Commodities Act of 1930 provided that an order could be "suspended, modified, or set aside by a court of competent jurisdiction" and that "all laws relating to the suspending or restraining of the enforcement, operation, or execution, or the setting aside in whole or in part, of the orders of the [ICC] are made applicable to orders of the Secretary under this Act." §§ 10-11, 46 Stat. 531, 535 (1930).

2. Emergency Price Control Act.

Congress introduced the term "determine the validity of" into U.S. law in a statutory review provision accompanying the EPCA. To *amicus*' knowledge, no statutory review provision for administrative agency action used this language before the EPCA's enactment in 1942 (and, indeed, Congress had used the term only once before in any public law). *See* Act to Establish a Court of Private Land Claims, ch. 539, § 8, 26 Stat. 854, 857 (1891) (authorizing court to "determine the validity" of title). Of relevance, section 204(d) of the Act gave the Emergency Court of Appeals (and the Supreme Court, on review of the Emergency Court's judgments):

> exclusive jurisdiction to determine the validity of any regulation or order . . . Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

EPCA § 204(d), 56 Stat. at 33. At the time that EPCA was introduced in Congress, members of the Executive Branch drafted an explanation of its

provisions. With respect to the "exclusive jurisdiction" provision, they said the following:

> The exclusive jurisdiction of the emergency court of appeals extends only to the review of price or rent ceiling regulations or orders and the suspension or revocation of licenses. Because of the opportunity provided for immediate review in the emergency court of such regulations or orders it is proper that their validity should not be questioned in any other court or in any collateral proceeding. Of course, the question whether there has been a violation of a ceiling regulation is subject to judicial determination in criminal or civil proceedings to enforce the statute, unless it has already been determined in proceedings for suspension or revocation of a license. Other regulations under the proposed statute are subject to review in the ordinary courts, in accordance with the applicable principles of law, in the same manner and to the same extent as the rules and regulations of other Federal administrative agencies.

Price-Control Bill, Hearings before the Committee on Banking and Currency, House of Representatives, 77th Cong., 1st Sess. 340 (Aug. 8, 1942); *see id.* at 171 (remarks of Leon Henderson, Administrator, Office of Price Administration). The Executive Branch's analysis thus distinguished certain regulations that would be subject to the "exclusive jurisdiction" provision from regulations reviewable "in the same

manner and to the same extent as the rules and regulations of other Federal administrative agencies."

In *Yakus*, the Court addressed the question whether section 204(d) of the Act "preclude[d] consideration by a district court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation." 321 U.S. at 418. The Court observed that, in *Lockerty v. Phillips*, 319 U.S. 182 (1943), it had previously held that the "exclusive jurisdiction" provisions gave the Emergency Court of Appeals "exclusive equity jurisdiction to restrain enforcement of price regulations of the Administrators and that they withdrew such jurisdiction from all other courts." 321 U.S. at 429; *see Lockerty*, 319 U.S. at 187-89 (holding that EPCA's "exclusive jurisdiction" provision barred wholesale meat dealers from suing to restrain the U.S. attorney from prosecuting them for violations of price regulations). The Court reasoned that, for the same reasons as in *Lockerty*, it reached "the like conclusion as to [district court] power to consider the validity of a price regulation as a defense to a criminal prosecution for its violation." 321 U.S. at 429. The provisions authorizing the Emergency Court of Appeals to "determine the validity" of orders and regulations and stripping other courts of jurisdiction "to consider the validity" of such orders and regulations, according to the Court, were "broad enough in terms to deprive the district court of power to consider the validity of the Administrator's regulation or order as a defense to a criminal prosecution for its violation." *Id.* at 430.

In reaching this conclusion, the *Yakus* Court relied on language from the Senate Report

accompanying the Emergency Price Control Act and a change that Congress made to the Act during its drafting. The Report of the Senate Committee on Banking and Currency observed that "[t]he courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court to determine the constitutional validity of the statute itself." Sen. Rep. 931, 77th Cong., 2d Sess., p. 25. Indeed, Congress had changed the language of the Act during the drafting process. As *Yakus* noted, "the bill as introduced in the House had provided that the Emergency Court of Appeals should have exclusive jurisdiction to determine the validity of the provisions of the Act authorizing price regulations, as well as of the regulations themselves." 321 U.S. at 430 (citing H.R. 5479, 77th Cong., 1st Sess., printed in Hearings before Committee on Banking and Currency, House of Representatives, 77th Cong., 2d Sess., on H.R. 5479, pp. 4, 7, 8). According to *Yakus*, the Report and the alteration manifested Congress' intent "to distinguish between the validity of the statute and that of a regulation, and to permit consideration only of the former in defense to a criminal prosecution." 321 U.S. at 430. *Yakus* thus construed the Act to establish that "the validity of the Administrator's regulations or orders should not be subject to attach in criminal prosecutions for their violation, at least before their invalidity had been adjudicated by recourse to the protest procedure prescribed by the statute." *Id.* at 430-31.

Shortly after this Court decided *Yakus*, Congress enacted the Stabilization Extension Act to mitigate some of the harshness of the Court's interpretation of the EPCA's review mechanisms. The Stabilization Extension Act, for example, removed the time period

for filing protests with the Price Administrator and permitted a defendant to file a protest following the initiation of the Price Administrator's enforcement suit, so long as the defendant could establish a "reasonable and substantial excuse" for failing to bring an earlier protest. 58 Stat. at 639. In enacting these legislative fixes, Congress implicitly ratified the *Yakus* Court's construction of the term "determine the validity of," while at the same time softening the ramifications of that construction.

3. The Administrative Procedure Act.

In 1946, Congress enacted the Administrative Procedure Act ("APA"). 60 Stat. 237 (1946). In the APA, Congress echoed some of the terminology used in the Urgent Deficiencies Act by authorizing a reviewing court to "(A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and *set aside* agency action, findings and conclusions under specified circumstances." § 10(e), 60 Stat. at 243 (codified at 5 U.S.C. § 706) (emphasis added). Congress also provided that "agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement," unless "prior, adequate, and exclusive opportunity for judicial review is provided by law." § 10(b), 60 Stat. at 243 (codified at 5 U.S.C. § 703).

In 1947, Attorney General Tom C. Clark published a manual — known as the *Attorney General's Manual on the Administrative Procedure Act* — providing the Department of Justice's interpretation of these provisions. With respect to the latter, the Attorney General's Manual stated that a statute may "expressly provide for an exclusive method of judicial review which precludes challenge

of agency action in enforcement proceedings" and cited section 204(d) of the EPCA. *Id.* at 99 & n.13. The Manual acknowledged that "[t]here are many situations in which the invalidity of agency action may be set up as a defense in enforcement proceedings." *Id.* at 100.

4. Administrative Orders Review Act.

The Hobbs Act had its genesis in a request from Chief Justice Harlan Fiske Stone that members of the Judicial Conference of Senior Circuit Judges study the procedure for judicial review of orders by the ICC and other agencies. *Providing for the Review of Orders of Certain Agencies, and Incorporating into the Judicial Code Certain Statutes Relating to Three-Judge District Courts*, Hearings before Subcommittee No. 3 and Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, on H.R. 1468, H.R. 1470, and H.R. 2271, 80th Cong., at 27 (Mar. 17, 1947) (hereinafter, "*Hobbs Act Committee Hearings*") (remarks of Judge Orie Phillips) (observing that the proposed legislation "had their beginning in a request made by the late Chief Justice Stone, that the judicial conference make a study of the procedure for review of administrative orders under the Urgent Deficiencies Act"). Under then-existing law, certain agency orders were reviewed by a three-judge district court and appealable as of right to the Supreme Court. *See id.*; *see also Report of the Judicial Conference of Senior Circuit Judges* 17 (1942) (noting that the appointed committee consisted of Judges Learned Hand, Calvert Magruder, Armistead Dobie, and Walter Lindley and ICC Commissioner Clyde B. Aitchison). After being appointed in 1942, the

Judicial Conference's committee initially split into two, with one part addressing proposed legislation providing for a uniform method of assembling three-judge district courts and another part addressing proposed legislation providing for appellate review of administrative orders. *See Report of the Judicial Conference of Senior Circuit Judges* 20-21 (1943) (noting that, in 1943, Judge Albert Maris presented the views of the first committee and that the two committees were then consolidated into a single committee chaired by Judge Orie Phillips). In 1944, the committee recommended a draft bill that (in the words of Chief Justice Stone) gave "to the Circuit Courts of Appeals . . . exclusive jurisdiction to enjoin or set aside certain specified orders of the Interstate Commerce Commission." *Report of the Judicial Conference of Senior Circuit Judges* 12 (1944).

The following year, in 1945, the Judicial Conference approved the draft bill for the ICC, and considered another proposed bill to regularize review of certain orders "of the Secretary of Agriculture under the Packers and Stockyards Act, 1921, and the Perishable Agricultural Commodities Act, 1930, certain orders by the Federal Communications Commission under the Communications Act of 1934, and certain orders by the United States Maritime Commission under the Shipping Act of 1916." *Report of the Judicial Conference of Senior Circuit Judges* 12 (1945). In 1946, the Judicial Conference accepted a request of the United States Maritime Commission to amend the ICC proposal to "bring orders of that agency within the provisions of the bill." *Report of the Judicial Conference of Senior Circuit Judges* 17 (1946). In addition, the Conference recommended adoption of a bill giving the circuit courts "exclusive

jurisdiction to enjoin, set aside, suspend, or determine the validity of all final orders of the Federal Communications Commission made under the Communications Act of 1934, as amended, and certain orders of the Secretary of Agriculture made under the Packers and Stockyards Act of 1921, as amended, and under the Perishable Agricultural Commodities Act of 1930, as amended." *Id.* (As is made clear by this sequence of events, this third recommendation adopted the "determine the validity of" language that found its way into the final Act.)

For these reasons, when the Judicial Conference finally presented legislation to Congress in 1947, it did so in the form of three separate bills. *See Hobbs Act Committee Hearings* 1, 5 (Mar. 7, 1947); *see also Report of the Judicial Conference of Senior Circuit Judges* 19 (1947) (noting that the Conference had approved "three legislative proposals, one with respect to review of certain orders of the [ICC] and the United States Maritime Commission, one with respect to review of certain orders of the Federal Communications Commission and the Secretary of the Agriculture, and one amending certain provisions of the Urgent Deficiencies Act, and providing a uniform procedure for constituting three-judge district courts" and that Judge Phillips "submitted the report of the Committee concerning the status of these Conference proposals" to Congress). Specifically, the review provision for proposed H.R. 1468 gave circuit courts "exclusive jurisdiction to enjoin, set aside, or suspend in whole or in part [certain] final orders" of the ICC and United States Maritime Commission. *Hobbs Act Committee Hearings* 21 (Mar. 17, 1947); *see also id.* at 22-24. By contrast, the review provision for proposed H.R. 1470 gave circuit courts "exclusive

jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders" of the FCC and the Secretary of Agriculture. *Id.* at 24; *see also id.* at 25-26.

After several years of consideration, Congress combined the relevant portions of the three bills into a single statute that became the Hobbs Act — authorizing review of the Federal Communications Commission, the Secretary of Agriculture, and the United States Maritime Commission. *See Report of the Judicial Conference of Senior Circuit Judges* 222 (1950). In doing so, Congress used the broader language contained in the original H.R. 1470, giving circuit courts "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all [listed] final orders." H.R. 5487, 81st Cong., 1st Sess. (introduced by Rep. Hobbs on July 5, 1949).

As a result, comparable to the EPCA, the enacted Hobbs Act granted a "party aggrieved" by an order the right to petition within 60 days from the order's entry, § 4, 64 Stat. at 1130 (codified at 28 U.S.C. § 2344), and thereby bring an action "against the United States" in the "judicial circuit in which the petitioner resides or has its principal office" or in the D.C. Circuit, § 3, 64 Stat. at 1130 (codified at 28 U.S.C. § 2343). The courts of appeals were given "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain final orders, § 2, 64 Stat. at 1129, including those involving the FCC in this case, *see* Pet. Br. 7-13; *see also* 28 U.S.C. § 2349(a) (authorizing the court of appeals to enter a "judgment determining the validity of, and enjoining, setting

aside, or suspending, in whole or in part, the order of the agency").

ARGUMENT

"[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). Justice Frankfurter's maxim all but decides this case. Here, the most plausible interpretation of the Hobbs Act is that Congress in 1950 incorporated the similar language used in the EPCA in 1942. As a result, the term "determine the validity of," as used in the Hobbs Act, carries the same meaning given to it under the EPCA — as well as the same limitations. That statutory term prohibits a district court from "determining the validity of" a regulation where, as in *Yakus*, a violation of the regulation is made an element of a crime or civil action. In such a case, a district court cannot reject any interpretation contained in the regulation without declaring the regulation invalid, because the statute itself is predicated on violating the regulation. But the Hobbs Act does not prohibit a district court from interpreting statutory text in other circumstances.

A. The Hobbs Act's use of the term "determine the validity of" incorporated preexisting statutory usage.

For several reasons, the most plausible inference is that the Hobbs Act's use of the term "determine the validity of" was intended to mimic the term's use in the EPCA.

For one thing, the EPCA was the only statutory review provision that had, to that date, used this terminology. That fact, in itself, is highly salient. In general, statutory provisions ought to be interpreted in a consistent fashion. *See* Caleb Nelson, *Statutory Interpretation* 486-525 (2011) (discussing the notion that "statutes address[ing] the same subject" might be read "*in pari materia*" such that "courts construing one statute should seek guidance from other related statutes"); *see Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality opinion of Scalia, J.); *cf. Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (indicating that the *in pari materia* canon, meaning the presumption that "a legislative body uses a particular word with a consistent meaning in a given context," is at its strongest "when the statutes were enacted by the same legislative body at the same time"). But where the statutory language is unusual for the context, there is every reason to believe the later-enacted statute was copied from (and intended to have the same meaning as) the earlier statute.

For another, cases involving the Emergency Price Control Act (and the Office of Price Administration's enforcement of it) could not have been more squarely in the public eye in the years preceding Congress's consideration and enactment of the Hobbs Act. For example, in 1944, 38,499 civil cases were commenced in federal district courts. *See* Report of the Judicial Conference of Senior Circuit Judges 6 (1945). That number increased to 60,965 in 1945 and 67,835 in 1946. *See id.* at 6. As the Judicial Conference observed, "[t]he phenomenal increase in the number of [civil] cases filed [in district courts] during the past two years is accounted for by the 28,653 civil cases commenced by the Office of Price Administration in

1945 and the 31,252 cases in 1946." *Id.* As a result, in 1946, "almost half of [all civil] cases were brought by the Office of Price Administration for enforcement of price control and rationing regulations." *Id.* at 5.

For yet another reason, there is evidence in the legislative record suggesting that informed observers would have understood the Hobbs Act's use of the language "determine the validity of" to be the same as the Emergency Price Control Act's use. An extensive objection at the 1947 subcommittee hearings indicates how at least one private attorney understood the Hobbs Act's language:

> I think Your Honors will recall in your deliberations on the Administrative Procedure Act that a strong contention had been made that it was inherently wrong in our country that a man could be indicted criminally for the violation of an administrative order and then not be permitted to defend himself on the ground that the order itself was invalid because beyond the authority of the agency to make it.
>
> That was an evil that had been developing in our country, the tendency being to say, "Well, you at least committed a crime because you violated the order. Maybe the order was no good, but you violated it."
>
> That was not quite a fair presentation, because so many of these orders, in the many of their wording, leave a layman in

a great deal of doubt as to just what his rights and duties are.

So, Your Honors, then, in the enactment of the Administrative Procedure Act, section 10, paragraph (b), provided, and we were all delighted with it, that the validity of an administrative order may be challenged by way of defense in a criminal proceeding brought to enforce such an order, under these conditions, being, namely, that there has not previously existed an adequate exclusive remedy of a different kind.

. . .

Now, in this legislation before Your Honors, I do not suppose with any deep-dyed plot, nonetheless I have observed that it is expressly provided that the system of review here set up shall be exclusive.

Now, that is not mere accident.

Were that concept to be continued in this legislation, should Your Honors pass it, it is the death knell again, before the ink is hardly dry, to the Administrative Procedure Act. It is the death knell to the opportunity of a defendant to say, "Well, if I did violate the order innocently, then the order itself was not a valid order." You are taking from him that right of defense in a criminal action, and I do not believe Your Honors would

> wish to do so so soon after the Administrative Procedure Act.

Hobbs Act Committee Hearings 45-46 (Mar. 17, 1947) (remarks of Mr. Charles Cotterill). No action appears to have been taken in light of these remarks, though there are scattered comments in the record suggesting concern about the proposed legislation's consistency with the Administrative Procedure Act. *See id.* at 113 (Mar. 10, 1949) (suggesting that Rep. Francis Walter, one of the APA's proponents, expressed such a concern); *id.* at 149 (Apr. 1, 1949). To be sure, *amicus* believes that the aforementioned remarks were merely those of a private attorney and by no means ought to be privileged in the search for the meaning of the Hobbs Act. But they cast light on what an informed observer might have thought the terms of the Act meant, in context, when Congress enacted the statute in 1950.

Finally, it is worth noting that the EPCA and the Hobbs Act are different in certain respects. For one thing, as the *Yakus* Court noted, the EPCA was a wartime measure; the Hobbs Act is not. For another, EPCA had a "belt and suspenders" aspect that the Hobbs Act lacks. The EPCA gave the Emergency Court of Appeals "exclusive jurisdiction to determine the validity of any regulation or order," while denying to other courts "jurisdiction or power to consider the validity of any such regulation, order, or price schedule." EPCA § 204(d), 56 Stat. at 33. The Hobbs Act lacks this "consider the validity" language.

Nevertheless, on balance and against the full backdrop, the most plausible inference is that the drafters of the Hobbs Act borrowed the "determine the validity of" language from the Emergency Price

Control Act. While the wartime nature of the EPCA is surely significant when it comes to the statute's constitutionality, it is unclear why it should have any significance on the question of the meaning of a statute. Moreover, while it is true that the Hobbs Act lacks the "belt and suspenders" quality of the EPCA, it is unclear why that should affect the proper interpretation of the terms that the Hobbs Act does contain: "Exclusive jurisdiction" to "determine the validity." At the end of the day, the most plausible inference is that informed members of the public would have understood the Hobbs Act's language to have essentially the same import as the same language from the Emergency Price Control Act — and to incorporate the holding of *Yakus*.

B. A court does not "determine the validity of" a regulation by disagreeing with the interpretation embraced in the regulation.

Just as the Hobbs Act incorporates the preexisting gloss on the terms "determine the validity," so too does it incorporate the preexisting limits imposed on those terms. In this instance, the critical limit is the distinction between a regulation that is made the predicate for a statutory violation, criminal or civil, and a regulation that merely interprets statutory text. In the former case, *Yakus* holds that a defense arguing that the regulation is invalid would ask the district court to "determine the validity of" the regulation. In the latter case, at the time of the Hobbs Act's enactment, the natural understanding would have been that mere judicial disagreement with an interpretation embraced by a

regulation does not call that regulation's "validity" into doubt.

First, the text of the Hobbs Act supports this interpretation. It grants courts of appeals the "exclusive jurisdiction" to "determine the validity of" agency regulations, thereby precluding district courts from doing the same. 28 U.S.C. § 2342. The text, however, does not suggest that district courts are precluded from taking actions with the "effect" of questioning the validity of an interpretation embraced by a regulation. The narrower language — "determine the validity of" — naturally encompasses fact patterns like the one at issue in *Yakus*, while leaving to district courts the ordinary judicial task of statutory interpretation.

Second, precedent supports this interpretation. Take *Yakus*, for example. The Court made clear that its holding was tied to the statutory scheme established by the EPCA, which "ma[de] criminal the violation of an administrative regulation, by one who has failed to avail himself" of separate procedures for appeal. 321 U.S. at 444. The Court repeatedly stressed this aspect of the EPCA, noting that the "indictment charged a violation of the regulation," *id.* at 447, that the district court was tasked with finding a "violation" of the regulation, *id.* at 444, and that the procedure was one in "which violation of a price regulation is made penal," *id.* at 446.

This Court's cases interpreting the Hobbs Act are to the same effect. *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970), addressed a lawsuit for damages under a port agreement approved by the Federal Maritime Commission, in which a defendant sought to assert a

defense that the agreement was invalid. *See id.* at 64-65 (noting that the Terminal Association brought a state-court action for damages and declaratory relief against the Boston Shipping Association, which defended on the ground that the revised tariff was invalid). Like *Yakus*, *Port of Boston* thus addressed a circumstance where the validity of the very "regulation" (in that case, a port agreement) was necessary to establish the elements of the common-law claim at issue in the lawsuit. *See* 420 F.3d 419 (1st Cir. 1970) (recounting facts). Like *Yakus*, *Port of Boston* thus illustrates that the Hobbs Act can have preclusive effect outside of the context of actions for injunctive or declaratory relief against the government. *See* 400 U.S. at 69. And most importantly, like *Yakus*, *Port of Boston* illustrates the limit to the application of the Hobbs Act: The lawsuit was about the validity of a tariff that formed the basis for recovery, not the appropriate interpretation of a statute.

Other cases involve a party seeking equitable or injunctive relief against the government, which brings it within the Hobbs Act's prohibitions on obtaining district-court relief to "enjoin," "set aside," or "suspend" a regulation. In *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), a company filed suit in district court "to enjoin action that is the outcome of [an FCC] order," *id.* at 468, thus naturally triggering application of the Hobbs Act's term. *Cf. ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1965).

Third, interpreting the "determine the validity of" language in the Hobbs Act more broadly would pose constitutional difficulties. *See, e.g.*, *Mendoza-Lopez*, 481 at 839 n.15; *Adamo Wrecking*, 434 U.S. at 289-91 (Powell, J., concurring). As the D.C. Circuit has put it, "[t]he nagging presence of a substantial due process question" with respect to preclusive review provisions "indicates, then, at the very least, the propriety of a narrow interpretation of" the statute. *Chrysler Corp v. EPA*, 600 F.2d 904 (D.C. Cir. 1979).

Fourth, broader jurisprudential principles regarding the relationship between statutory meaning and agency regulatory authority support this construction of the Hobbs Act. Any argument that judicial disagreement with a regulation's interpretation calls into doubt the regulation's "validity" necessarily depends on the notion that a court must adopt the agency's regulatory interpretation under certain circumstances. Put differently, a necessary premise to the Fourth Circuit's decision below is that a court addresses the "validity" of an agency regulation any time that it interprets the relevant statute. That premise itself rests on a further premise that the interpretations set forth in agency rules must be accorded weight by reviewing courts under appropriate circumstances. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). (Were the Court not to give weight to agency interpretations under *Chevron*, nobody would argue that a district court's construction of a statute "determine[d] the validity of" an agency regulation saying the contrary.)

There is ample reason to believe, however, that *Chevron* departs from the prevailing views on

statutory interpretation at the time of the APA's, and hence the Hobbs Act's, adoption. *See, e.g., Fast v. DiSalle*, 193 F.2d 181, 184 (Emergency Ct. App. 1951) (stating that "complainants are quite wrong in supposing that . . . the enforcement court would be bound to assume the correctness and validity of the enforcement director's interpretation of the regulation," but rather "[t]he enforcement court would have to make its own independent determination of a question of law, as to whether . . . the regulation, properly interpreted, authorized the price increases in question"); *see generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 Yale L.J. 908 (2017).

A holding contrary to the one set forth above, thus, has the potential to import the entire *Chevron* framework into the jurisdictional analysis under the Hobbs Act. That is because, on the theory that would underlie such a holding, a reviewing court could be viewed as calling into question the regulation's "validity" *only if* the ordinarily applicable principles required the court to defer to the agency's regulatory interpretation.

Jurisdictional issues should be clear. *Hertz Corp v. Friend*, 559 U.S. 77, 96 (2010). Whatever the merits of the *Chevron* framework, its application is not clear. Respectfully, the court should hesitate before making the Hobbs Act's jurisdictional rules turn on the applicability of the *Chevron* doctrine.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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